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RECORD & BRIEFS

No. 08-

IN THE

Supreme Court of the United States

BEST WESTERN ENCINA LODGE & SUITES; ENCINA-PEPPER TREE, LTD.; JEANETTE WEBBER; CECILIA E. VILLINES,

Petitioners.

v.

HOLLYNN D'LIL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a plaintiff has standing to assert an Americans with Disabilities Act ("ADA") claim solely for injunctive relief against a hotel even though the district court found that the plaintiff had not proven any intent to return to the hotel at the time she filed her complaint and that she had filed numerous complaints with similar allegations and never had returned to those hotels.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, David Z. Webber was a defendant below. Mr. Webber is now deceased.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Best Western Encina Lodge & Suites, Encina-Pepper Tree, Ltd., Jeanette Webber, and Cecilia E. Villines respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-22a, is reported at 538 F.3d 1031. Its decision denying the petition for rehearing and rehearing en banc, Pet. App. 47a, is unreported. The opinion of the district court, Pet. App. 23a-46a, is reported at 415 F. Supp. 2d 1048.

JURISDICTION

The court of appeals issued its judgment and opinion on August 12, 2008. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on October 6, 2008. *Id.* at 47a. On December 8, 2008, Justice Kennedy extended the time for filing this petition to and including February 3, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution, which provides:

> The judicial Power shall extend to . . . Cases . . . [and] Controversies . . . .

42 U.S.C. § 12182(a) (Title III of the Americans with Disabilities Act ("ADA")), which provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment . . . of any place of public accommodation . . . .

42 U.S.C. § 12188(a)(1), which provides that injunctive relief is available under Title III of the ADA to:

> any person who is being subjected to discrimination on the basis of disability . . . or who has reasonable grounds for believing that such person is about to be subjected to discrimination . . . .

STATEMENT OF THE CASE

The decision below conflicts with this Court's interpretation of Article III of the Constitution, which requires a plaintiff who seeks injunctive relief to present concrete proof of a real and immediate threat of future injury in order to have standing to sue in federal court. The court of appeals diluted these requirements by holding that respondent has standing to pursue injunctive relief against a hotel under the Americans with Disabilities Act ("ADA"), notwithstanding the district court's findings – well-supported by an evidentiary hearing solely on the issue of Article III standing – that she had not proven any intent or concrete plans to return to the hotel at the time she filed her complaint. This holding also conflicts with the decisions of other federal courts that have been faithful to this Court's decisions and presents an issue of national importance due to the explosive growth of private ADA enforcement by repeat litigants who file complaints with similar allegations against numerous businesses.

A. Statutory Background.

Congress enacted the ADA in 1990 in order to "remedy widespread discrimination against disabled individuals." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 674 (2001). This case concerns Title III of the ADA, which prohibits discrimination in public accommodations, including hotels. See 42 U.S.C. §§ 12182(a), 12181(7)(A). Title III provides for private rights of action. *Id.* § 12188(a)(1). Under the ADA, damages are not available to individuals. Individuals may only sue to obtain injunctive relief. See *id.* (injunctive relief is available under Title III to "any person who is being subjected to discrimination on the basis of disability . . . or who has reasonable grounds for believing that such person is about to be subjected to discrimination"). Attorney's fees are recoverable under Title III in these actions seeking injunctive relief. *Id.* § 12205. In addition, some states, including California, provide for damages for those who prove they were the victims of disability-based discrimination.

Notwithstanding the ADA's broad purposes, Congress recognized that requiring existing structures to be retrofitted and rebuilt to accommodate individuals with disabilities would impose an unacceptable burden on businesses. Accordingly, Congress established different requirements for new construction undertaken after the ADA's enactment than for existing structures. Specifically, Congress required newly constructed facilities, *i.e.* "facilities for first occupancy later than 30 months after July 26, 1990," to be "readily accessible to and usable by individuals with disabilities." *Id.* § 12183(a)(1). In contrast, "existing facilities" must only incorporate accommodations for the disabled that are "readily achievable." *Id.* § 12182(b)(2)(A)(iv). As Congress

explained, the lower "readily achievable" standard for existing facilities "reflects the balance between the need to provide access for persons with disabilities and the desire to impose limited costs on businesses." H.R. Rep. No. 101-485, pt. 3, at 60 (1990). The higher "readily accessible" standard applies to "alterations" in public accommodations, but only where the alterations "affect[] or could affect the usability of the facility." 42 U.S.C. § 12183(a)(2).

B. Factual Background.

Petitioners are the owners[1] of the Best Western Encina Lodge in Santa Barbara, California, a hotel that was constructed long before the ADA and most of California's disabled access laws were enacted. The hotel consists of several buildings that were constructed between 1958 and 1980. Consistent with their obligations under the ADA and California law, petitioners have made numerous "readily achievable" upgrades to the facilities' original construction in order to make the facilities more accessible to the disabled: *e.g.*, they installed a ramp leading to the office and added disabled accessible parking.

Respondent Hollynn D'Lil is a paraplegic who requires a wheelchair for mobility. At the time of the evidentiary hearing below, she had filed 62 prior lawsuits under the ADA and California civil rights law and had received at least $378,000 in settlements from these suits. Transcript of Evidentiary Hearing Regarding Standing ("Evid. Hrg. Tr.") at 64, 96.[2]

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[1] Encina-Pepper Tree, Ltd. is a closely-held, limited partnership. The partnership independently owns and operates the Best Western Encina Lodge as a franchisee of Best Western International, Inc.

[2] This transcript is document 55 in the parties' excerpts of record in the Ninth Circuit.

Respondent works as an accessibility consultant for ADA plaintiffs' attorneys, as well as local governments and businesses. *Id.* at 35-36.

On December 13, 2001, respondent traveled from her home in Sacramento, California to Santa Barbara to conduct multiple sub rosa property inspections for an ADA plaintiffs' attorney. *Id.* at 37, 44. Earlier that day, after calling several other hotels, the Encina Lodge allegedly informed her that a wheelchair-accessible room was available.[3] She proceeded to reserve a room. However, when respondent arrived at the hotel, she encountered what she believed to be numerous architectural barriers to wheelchair access in both her room and the common areas of the hotel. She nevertheless stayed at the hotel that night and the next night. *Id.* at 49; see also *id.* at 78-79 (testifying that she did not "have any thought about checking out of the Best Western" and staying at another hotel).

After respondent's stay, she did not write a letter to the hotel requesting that the alleged problems she encountered be corrected. *Id.* at 68. Instead, she filed the instant lawsuit on December 13, 2002, a full year after her stay. She provided no explanation for waiting one year to file the lawsuit and conceded that she did not ask her counsel to expedite the filing of the case. *Id.*

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[3] Respondent Webber testified that the hotel's policy in December 2001 was to inform potential guests that the hotel "did not have completely accessible guest rooms"; rather, that it had "partially accessible" rooms that could accommodate wheelchairs, but did not have features such as "roll-in showers and bars on the toilets." Evid. Hrg. Tr. at 106-07.

C. Proceedings Below.

Respondent's Lawsuit. Respondent's suit sought injunctive relief under Title III of the ADA, injunctive relief and damages under California civil rights law, and attorney's fees and costs, based on numerous alleged ADA violations. Pet. App. 3a. Petitioners challenged respondent's standing to bring suit in their motions to dismiss and for partial summary judgment, but those challenges were rejected. *Id.* at 3a n.3.

The case was litigated for more than two years. During this time, respondent demanded extensive reconstruction of the hotel based on the fact that petitioners had undertaken air conditioning upgrades, exterior work, re-tiling, re-painting, and re-carpeting, which respondent argued constituted "alterations" that triggered a statutory obligation to make the hotel "readily accessible" through reconstruction and retrofitting. When the case was set to go to trial, the parties entered into a consent decree, which was approved by the district court on January 11, 2005.[4] Without admitting liability or any of the allegations in respondent's complaint, petitioners agreed to undertake extensive renovations to the hotel in order to make it more accessible to disabled patrons, including numerous upgrades to common areas and the provision of four fully accessible guestrooms. The consent decree reserved the issue of attorney's fees and costs for future resolution. Pet. App. 3a.

When respondent filed a motion for attorney's fees, the district court expressed concerns about her standing and issued a sua sponte order requiring the

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[4] The consent decree is document 40 in the parties' excerpts of record in the Ninth Circuit.

parties to address that issue. Pet. App. 3a. The parties subsequently filed briefs and an evidentiary hearing was held on September 22, 2005, at which respondent was the principal witness. At that hearing, respondent's counsel failed to ask her any questions concerning her intent to return to Santa Barbara or the Encina Lodge as of December 13, 2002, the date the complaint was filed. Instead, respondent's counsel asked some questions about her intentions and future plans as of the date of the hearing (which took place more than two-and-a-half years later). *Id.* at 34a-35a.

With respect to these intentions, respondent testified that she had a trial coming up in Santa Barbara in November and had been "talking about taking a vacation" in Santa Barbara to visit friends. Evid. Hrg. Tr. at 54-55. She conceded, however, that she did not yet have a place to stay for the upcoming trial, *id.* at 55, and there is no testimony as to whether she either had contacted or planned to contact the Encina Lodge in connection with her potential future stays. She also mentioned the possibility of "doing some more work in Solvang," but she testified about attempting to evaluate the Ramada in Santa Barbara as potential lodging for that possible stay, not the Encina Lodge. *Id.* at 50. Moreover, the Encina Lodge would hardly be the most convenient option for a trip to Solvang because Solvang is approximately 33 miles north of Santa Barbara and contains many hotels.

Respondent also testified concerning her past visits to Santa Barbara. See *id.* at 45 (testifying that she visited Santa Barbara three times in 2001 and then an average of "one to two times a year" in 2002 and thereafter). In addition, respondent testified that she would prefer to stay at the Best Western Encina

Lodge rather than other Santa Barbara hotels that are accessible because the Encina Lodge is "simple" and "easy" since "you park close to your room, and it has a place to eat." *Id.* at 58; see also *id.* at 57, 62 (testifying that other hotels either are "very expensive," require her to travel with an assistant, or have "problems").

Significantly, respondent conceded with respect to six ADA lawsuits that she had brought and settled against six different hotels in Redding, California – all arising out of a visit to Redding on a single day in March 2002 – that she had never been back to any of the hotels, had never attempted to go back to any of the hotels, and had never even contacted the hotels to find out if the remediation had been completed. *Id.* at 92-95; see also *id.* at 95 (respondent's recovery from the six Redding lawsuits was $90,000).

District Court Decision. The district court held that respondent failed to prove her standing to sue at the time the action was filed because her testimony failed to "[a]ddress[] [t]he [r]elevant [i]ssue." Pet. App. 34a. Specifically, the district court found that she "provided no evidence that her injury was 'actual or imminent,' as opposed to 'conjectural or speculative,' *as of December 2002*" because she presented no testimony as to "her intention – as of December 13, 2002 – to return to Santa Barbara, her plans for returning to Santa Barbara, and her intention to stay at the Encina Lodge if it were made accessible." *Id.* at 34a-35a. Moreover, the district court noted that "[b]ecause questions relating back to 2002 were so obviously relevant and could so easily have been addressed, the Court can only assume the answers would not have established standing." *Id.* at 35a.

Even though the district court noted that its function was not "to speculate about what case a plaintiff might have been able to present if she had focused on the relevant issues," it nevertheless "consider[ed] whether the record suggests evidence that might have been able to establish standing if the issue had been properly addressed." Pet. App. 36a. On this score, the district court concluded that the record contained no such evidence. See *id.* at 37a ("it is nearly impossible to determine what Plaintiff's plans and intent might have been in 2002 based on her testimony about present plans"). Indeed, the district court examined numerous factors and concluded that none of them assisted respondent in establishing standing. For example, the district court noted that respondent admitted that "she never stayed at the Encina Lodge before the stay at issue" and that she did not prove "that she has frequented other Best Western hotels or that she has a preference for Best Western hotels." *Id.* In addition, the district court found that respondent's testimony as to her frequency of travel to Santa Barbara was "inconsistent" and "somewhat exaggerated" as compared to her summary judgment declaration. *Id.* at 43a. The district court specifically found that it could not "find evidence – as of December 13, 2002 – of any future plans to travel to Santa Barbara for business." *Id.* at 45a.

With respect to respondent's intentions to return to the Encina Lodge specifically, the district court found respondent's testimony that she would choose the Encina Lodge over other Santa Barbara hotels to be "somewhat curious," "evasive," and "not credible." Pet. App. 39a-40a. In this regard, the court observed that respondent's claim of preference for smaller

hotels was not credible in light of her history of patronizing large ones. *Id.* at 41a.

The court also noted that respondent had failed to return to any of the six hotels in Redding, California that she also sued and obtained settlements against. Pet. App. 41a. It reasoned that "[s]tatements made by Plaintiff in connection with those other lawsuits are certainly relevant to her credibility here." *Id.* at 42a n.14. Specifically, the district court concluded:

> [I]t appears Plaintiff declares that she intends to return to nearly every place she sues (as indeed she must in order to establish standing in federal court). While some of these allegations may have initially been accepted in other cases without question, even at the trial stage, as more suits are filed and more – and contradictory – allegations are made, credibility concerns increase.

Id. at 42a. Ultimately, the district court concluded that it was "not convinced of the sincerity of Plaintiff's allegations of her desire to stay at Encina Lodge." *Id.*

Ninth Circuit Decision. A split panel of the Ninth Circuit reversed the district court's decision with respect to standing.[5] The panel majority conceded that respondent "was never explicitly asked whether she intended to return [to the Encina Lodge] as of December 13, 2002." Pet. App. 12a. It nevertheless concluded that "that she so intended is the obvious and most reasonable inference to be drawn from her testimony." *Id.* In reaching this conclusion, the court of appeals neither addressed the district

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[5] The panel majority also addressed other issues that are not relevant here.

court's express evidentiary finding to the contrary nor provided any rationale for rejecting the district court's finding. Indeed, in support of its "reasonable inference," the panel majority made several findings concerning respondent's testimony at the evidentiary hearing that are directly contrary to the district court's assessment of that same evidence. For example, in stark contrast to the district court's findings, the panel majority found that respondent's testimony showed that she "regularly visited Santa Barbara both before and after she filed the complaint" and that she "would prefer to stay at the Best Western Encina Lodge during her regular visits to Santa Barbara if it were made accessible." *Id.* at 12a-13a. The panel majority also noted that a "careful review" of respondent's testimony showed that "she had at least one concrete plan to return to the Santa Barbara area at the time she filed suit." *Id.* at 13a n.9 (citing possible business trip to Solvang).

The panel majority further stated that respondent's desire to return to the Encina Lodge was "well supported by the evidence that she submitted at each successive stage of the litigation." Pet. App. 10a. Accordingly, the panel majority quoted and relied on portions of the complaint and respondent's summary judgment declaration in support of its inferences. *Id.* at 10a-11a.

The panel majority also held that "[t]o the extent that" the district court's concerns about respondent's credibility "might be viewed as an adverse credibility finding," it "reject[ed] the legal reasoning on which such finding is based." Pet. App. 14a. The panel majority noted that the district court had "focused particularly on [respondent's] past ADA litigation" and stated that it could not agree "that [respondent's]

past ADA litigation was properly used to impugn her credibility." *Id.* at 14a, 16a. Indeed, the majority went so far as to suggest that taking respondent's past litigation conduct into account in evaluating her credibility might violate her First Amendment rights. *Id.* at 15a.

Judge Rymer dissented from the panel majority's standing ruling, stating that the majority "improperly" "decline[d] . . . to accept the district court's finding that [respondent] failed to provide evidence of her intent to return to the Best Western Encina as of the time her complaint was filed." Pet. App. 18a. In this regard, Judge Rymer noted that "the district court found that [respondent] had adduced *no* evidence as to her intent to return to Santa Barbara or to the Best Western (if accessible) as of December 2002, when the action was brought" and that "[t]he record discloses no such evidence." *Id.* at 19a-20a.

Judge Rymer further criticized the majority for failing to "defer[] to the district judge's assessment" and instead "decid[ing] for itself what 'the obvious and most reasonable inference to be drawn from [respondent's] testimony' is." Pet. App. 19a. Relatedly, Judge Rymer noted that the majority improperly relied on the complaint and summary judgment filings because those documents are supposed to "fall by the wayside once an evidentiary hearing is held." *Id.*

Finally, Judge Rymer disagreed with the majority's rejection of the district court's concerns about respondent's credibility. She noted that the district court did not question respondent's credibility based on her history of ADA litigation, but instead "reasoned that *statements* [respondent] made in connection with other lawsuits are relevant to

credibility." Pet. App. 21a. She further noted that the district court's reasoning is "surely correct, for to the extent that [respondent] *represented* in prior lawsuits that she intended to return to the place of accommodation at issue in those cases in the reasonably near future, yet never has, the sincerity of a similar expression of intent in this lawsuit . . . is called into question." *Id.*; see also *id.* (suggesting that respondent has "made so many commitments to return to so many places of public accommodation in so many different locales that returning to the place at issue in this case – the Best Western Encina – is infeasible or, at least, implausible").

The Ninth Circuit denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The decision below merits review because it conflicts with this Court's constitutional standing jurisprudence requiring concrete proof of a real and immediate threat of future injury to pursue injunctive relief. See Sup. Ct. R. 10(c) (a consideration favoring review on certiorari is where a federal court of appeals "decided an important federal question in a way that conflicts with relevant decisions of this Court").

Parties seeking to "invoke the power of federal courts" must satisfy the threshold requirement imposed by Article III of the Constitution that they "must allege an actual case or controversy." *O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974) (citing cases). "[A]n essential and unchanging part of th[is] case-or-controversy requirement" is the doctrine of standing.

Lujan v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). This Court has defined the "irreducible constitutional minimum of standing" as including "injury in fact": the "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotations marks omitted). "Abstract injury is not enough." *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983). Instead, "[p]laintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of' important questions of federal law. *Id.* (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

In the context of injunctive relief, this Court has further held that standing principles require the plaintiff to show that he "has sustained or is *immediately* in danger of sustaining some direct injury" as the result of the challenged conduct. *Lyons*, 461 U.S. at 102 (internal quotation marks omitted; emphasis added); *see also id.* at 105 (plaintiff must show a "*real and immediate threat*" of repeated injury); *id.* at 110 (same). In particular, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96.

As a procedural matter, this Court has held that it is the plaintiff's burden to establish standing. *Lujan*, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing these elements."). This is not a mere pleading requirement; rather, as "an indispensable part of the plaintiff's case," each element of standing "must be supported in

the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (citing *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990)). In addition, the evidence relating to the standing inquiry consists of the facts as they existed at the time the complaint was filed. See *id.* at 569 n.4 ("The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*") (internal quotation marks omitted).

The Ninth Circuit has now abandoned core components of this framework. Although the court of appeals paid lip service to the foregoing principles, *see* Pet. App. 7a-8a, it plainly ignored them in overturning the district court's finding that respondent failed to substantiate her alleged intent to return to the Encina Lodge at the time her complaint was filed. Specifically, the court of appeals' decision conflicts with this Court's standing decisions in three ways.

First, the court of appeals' decision conflicts with this Court's holding that a plaintiff must establish that standing existed at the time the action was filed. *Lujan*, 504 U.S. at 569 n.4. After holding an evidentiary hearing specifically designed to provide respondent with a full and fair opportunity to establish her standing as of the time the action was filed, the district court unequivocally determined that respondent failed to satisfy this fundamental burden: "Plaintiff provided *no evidence* that her injury was 'actual or imminent,' as opposed to 'conjectural or speculative,' *as of December 2002.*" Pet. App. 34a (first emphasis added); see also *id.* at 35a ("Plaintiff was asked *no questions* that would elicit" the relevant testimony) (emphasis added). Moreover, the district

court expressly found that respondent's failure was not a mere technical oversight: "Because questions relating back to 2002 were so obviously relevant and could so easily have been addressed, the Court can only assume the answers would not have established standing." *Id.*

The court of appeals' holding that respondent had standing to assert a claim for injunctive relief even though the district court found that she had not proven any intent to return to the Encina Lodge at the time the complaint was filed simply flies in the face of *Lujan*, *Lyons*, and *O'Shea*. Those cases unequivocally require a plaintiff to demonstrate a "real and immediate threat" of repeated injury at the time suit is filed – and not some later time. See *Lyons*, 461 U.S. at 105, 110; *Lujan*, 504 U.S. at 569 n.4. By failing to present any evidence that she had concrete plans or intentions to return to the hotel when the complaint was filed, respondent failed to show that the hotel posed a "real and immediate threat" of harm to her at that critical time. Simply put, if she had no plans to patronize the hotel again at the time she filed her complaint, then she had no personal stake in the injunctive relief that she sought and, therefore, no standing. Under *Lujan*, *Lyons*, and *O'Shea*, that should have been the end of the matter.

Second, even aside from the timing issue, the court of appeals' analysis is irreconcilable with the standing principles that this Court set forth in *Lujan*, *Lyons*, and *O'Shea*. In spite of respondent's failure to present evidence of her intent to return to the hotel at the time the complaint was filed, the district court and the court of appeals both examined the evidence that she presented regarding her plans and intentions *at the time of the evidentiary hearing* to determine "whether the record suggests evidence that

might have been able to establish standing if the issue had been properly addressed." Pet. App. 36a; *id.* at 12a (purporting to draw "inference[s]" from the record). The district court and the court of appeals, however, came to starkly opposite conclusions with respect to what the evidence showed: the district court concluded that it was "impossible to determine what Plaintiff's plans and intent might have been in 2002 based on her testimony about present plans," *id.* at 37a; for its part, the court of appeals concluded that the record evidence established respondent's standing. *Id.* at 9a.[6]

The court of appeals was able to reach this conclusion only by diluting – if not abandoning – principles that this Court set forth in *Lujan*, *Lyons*, and *O'Shea*. For example, the court of appeals cited respondent's prior visits to Santa Barbara as confirmation of her intent to return. Pet. App. 9a-10a. But, as Justice Scalia stated for the Court in *Lujan*, "[t]hat the [plaintiff] 'had visited' the areas . . . before . . . proves nothing." *Lujan*, 504 U.S. at 564. In addition, the Court expressly noted in *Lyons* that "[p]ast" events are insufficient to "show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lyons*, 461 U.S. at 102 (internal quotation mark omitted; alteration and omission in original).

The court of appeals also abandoned any semblance of adhering to the requirement that a plaintiff must show a "real" and "imminent" threat of injury to have

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[6] Judge Rymer is no doubt correct that the Ninth Circuit's failure to "defer[] to the district judge's assessment" of the evidence was blatantly inconsistent with the clearly erroneous standard of review, but that issue does not present a separate reason to grant certiorari. *See* Pet. App. 19a.

standing to seek injunctive relief. *Lujan*, 504 U.S. at 564; *Lyons*, 461 U.S. at 105, 110.[7] The court of appeals' standing determination was based on its conclusion that "[a] careful review of [respondent's] testimony . . . shows that she had at least one concrete plan to return to the Santa Barbara area at the time that she filed suit." Pet. App. 13a n.9 (citing respondent's testimony that she "thought [she] would be doing some more work in Solvang," Evid. Hrg. Tr. at 50). Under this Court's precedent, it strains credulity to suggest that this single, unelaborated statement about work that respondent "thought" she might get in another city at an unspecified future time could establish a "real" or concrete plan on respondent's part to return to the Encina Lodge, much less an "imminent" plan to do so.[8]

"Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative . . . that the injury is *certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (internal

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[7] Title III's injunctive relief provision effectively incorporates the "real and imminent" threat requirement of this Court's standing decisions. *See* 42 U.S.C. § 12188(a)(1) (injunctive relief is available under Title III to "any person who is being *subjected to* discrimination on the basis of disability . . . or who has reasonable grounds for believing that such person is *about to be subjected to* discrimination") (emphases added).

[8] In any event, as noted, the district court concluded that the record did not contain "evidence – as of December 13, 2002 – of any future plans to travel to Santa Barbara for business." Pet. App. 45a; *see also id.* at 40a-41a ("There is no evidence of how often she might have intended to visit Solvang as of 2002, or for what purpose, except that it appears to be business-related.") The court of appeals also ignored that when testifying about a possible trip to Solvang, respondent testified that she was considering *the Ramada* for her lodging.

quotation marks omitted). Here, respondent's testimony established, at best, "an injury at some indefinite future time," a showing that this Court specifically has held insufficient to establish "imminence," particularly where "the acts necessary to make the injury happen are at least partly within the plaintiff's own control," as they plainly were here. *Id.* In such circumstances, this Court has insisted that any "injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred." *Id.*

In sum, the court of appeals' conclusion that respondent's suggestion of a possible future business trip that might bring her near Santa Barbara at an unspecified time was sufficient to establish standing is flatly inconsistent with this Court's unequivocal holding that "'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury" that this Court's cases require. *Id.* at 564.

Third, the court of appeals ignored this Court's express holding that the plaintiff's burden is to establish each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883-89 (1990). Specifically, this Court has held that for cases that have proceeded beyond the pleading and summary judgment stages to the "final stage," facts relevant to the standing inquiry "must be supported adequately by the evidence adduced" at a hearing. *Lujan*, 504 U.S. at 561 (internal quotation omitted).

Here, even though the district court held an evidentiary hearing at which respondent testified and was subject to cross-examination, the court of appeals

relied on allegations in the complaint and statements from respondent's summary judgment declaration in support of its factual "inferences." See Pet. App. 10a-11a. This reliance plainly was improper because once a case is at its "final stage" and the plaintiff's sworn testimony has been tested through cross-examination, allegations in the complaint cannot be assumed to be true and statements in a declaration cannot be viewed in a light most favorable to the plaintiff. These principles should have particular force in the ADA standing context, where the inquiry turns on "facts" that are entirely within the plaintiff's knowledge and control. Accordingly, the court of appeals' use of the complaint and summary judgment declarations to fill in gaps in the factual record was contrary to this Court's precedent.

Both individually and collectively, these rulings represent a stark departure from this Court's standing jurisprudence. The Ninth Circuit has effectively rendered null the requirement that an ADA plaintiff seeking injunctive relief demonstrate that she faces a "real and imminent" threat of injury by the entity she is suing. As a result, owners of public accommodations in the Ninth Circuit face the prospect of unbounded lawsuits by individuals who come into contact with them on even a single occasion, and have no "real" intent of returning. This plays into the hands of ADA plaintiffs who make it their business (literally) to sue owners of public accommodations and have no "personal stake" in the remediation that they seek. See, *infra*, Section III. The Ninth Circuit's abandonment of standing

principles established by this Court warrants this Court's review.[9]

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS THAT REQUIRE ADA PLAINTIFFS SEEKING INJUNCTIVE RELIEF TO PRESENT ROBUST PROOF OF IMMINENT INJURY.

The decision below conflicts with decisions of other courts of appeals that have rigorously applied this Court's standing jurisprudence in the context of plaintiffs seeking injunctive relief under the ADA and other statutes. In *Shotz* v. *Cates*, 256 F.3d 1077, 1082 (11th Cir. 2001), for example, the Eleventh Circuit affirmed the dismissal of an ADA complaint seeking injunctive relief with respect to alleged architectural barriers at a courthouse where the plaintiffs alleged only "past incidents of discrimination" and had not attempted to return to the building nor "alleged that they intend to do so in the future." *Id.* at 1082. The court of appeals noted that the likelihood of future discrimination was

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[9] There is no merit to the court of appeals' claim that it was justified in "tak[ing] a broad view of constitutional standing . . . where, as under the ADA, private enforcement suits are the primary method of obtaining compliance with the Act." Pet. App. 7a (internal quotations omitted). This Court consistently has refused to relax or disregard Article III standing principles "for the sake of convenience and efficiency." *Raines* v. *Byrd*, 521 U.S. 811, 820 (1997). Nor is it relevant that the ADA is a remedial statute. Article III's bedrock principles do not bend, which is why this Court has adhered to its standing principles in the context of other remedial statutes such as the Clean Water Act, *see Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000), and the Endangered Species Act, *Lujan*, 504 U.S. 555.

merely "conjectural, hypothetical, or contingent." *Id.* (internal quotation omitted).

Similarly, in *Access for America, Inc.* v. *Associated Out-Door Clubs, Inc.*, 188 F. App'x 818 (11th Cir. 2006) (per curiam), the Eleventh Circuit affirmed the dismissal of an ADA complaint seeking injunctive relief against a greyhound track because the plaintiff "could not demonstrate that there was any reasonable chance of his revisiting the Track, other than 'someday.'" *Id.* at 818. The court of appeals deemed insufficient the plaintiff's statements signaling an intent to make "spontaneous" trips to the track "in certain months and during certain vacations." *Id.* at 819 (Barkett, J., dissenting) (internal quotation marks omitted).

In *Animal Legal Defense Fund, Inc.* v. *Espy*, 23 F.3d 496 (D.C. Cir. 1994), which did not involve the ADA, the D.C Circuit analyzed one of the plaintiff's standing to challenge a Department of Agriculture regulation by rigorously evaluating "the immediacy rather than the specificity of [her future] plan[s]." *Id.* at 500. The court of appeals found standing lacking where the plaintiff had "merely state[d] that at some undefined future time" she would "engage in further [conduct carrying the risk of injury]." *Id.* at 500 (internal quotation marks omitted). Even that was "in part not literally true," the court of appeals observed, because "[s]he will not be *required* to do so"; "[w]hether she will do so is wholly within her control." *Id.* The court of appeals declined to "say that the injury she seeks to litigate is 'certainly impending,'" where no such injury will be suffered "unless she makes a further choice to subject herself to it." *Id.* at 501 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)).

Other courts of appeals, like the Ninth Circuit here, however, have exhibited a willingness to relax the quantum of evidence necessary to show "real and imminent" injury and concrete plans to return in the ADA context. In *Camarillo* v. *Carrols Corp.*, 518 F.3d 153, 158 (2d Cir. 2008) (per curiam), for example, the Second Circuit found that the plaintiff had standing to assert a claim under Title III of the ADA against restaurant owners based on: (1) her allegation of *past* injury under the ADA; (2) the court of appeals' inference from her complaint that the discriminatory treatment was likely to continue; and (3) the court's inference, based on the *past* frequency of her visits and the proximity of defendant's establishments to her home, that she intended to return at some unspecified time "in the future." *Id.* The court of appeals ignored the district court's finding that she "did not allege facts" sufficient to establish standing. *Id.* at 155.[10]

Similarly, in *Steger* v. *Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000), the Eighth Circuit held that an ADA plaintiff had standing to seek injunctive relief against an office building based solely on the facts that he had visited it a single time and testified that he "frequently visits government offices and private businesses" in the same city for his job. *Id.* at 891-92. The court of appeals did not even address whether the plaintiff had any future plans – "concrete" or otherwise, "some day" or any day – to return to the building or even to the city at the time he filed suit.

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[10] *But see Freydel* v. *New York Hospital*, 2000 WL 1836755, at *5-*6 (2d Cir. Dec. 13, 2000) (unpub.), where the Second Circuit held that a plaintiff who sought injunctive relief under the ADA against a hospital failed to show a real and immediate threat of repeated injury because she had visited the hospital only once and showed only that she "'may" be referred there in the future.

In addition, at the district court level, numerous cases are in tension with or flatly contradict the outcome reached by the decision below. For instance, the court in *Blake* v. *Southcoast Health System, Inc.*, 145 F. Supp. 2d 126 (D. Mass. 2001), firmly rejected the panel majority's notion that standing can be expanded beyond its constitutional parameters to "tak[e] into account the broader policy concerns that specifically underlie the ADA." *Id.* at 134. While "recogniz[ing] that the ADA was fashioned to 'provide a clear and comprehensive national mandate' for the elimination of discrimination against individuals with disabilities," *id.*, the court observed that "every court to have considered the standing requirements under Title III of the ADA has held that in order for a private litigant to prove standing, she must show a risk of future harm." *Id.* at 132-33. In its absence, "the important policy concerns that the ADA embodies are insufficient to give rise to standing." *Id.* at 134.

Indeed, several district courts have found standing lacking on facts similar to those here. In *Rosenkrantz* v. *Markopoulos*, 254 F. Supp. 2d 1250 (M.D. Fla. 2003), for example, the court held that the plaintiff lacked standing to seek injunctive relief against a hotel under Title III because he "lives hundreds of miles away," had only been to the target location "once," and had an "irregular, occasional, and infrequent" travel history to the area. *Id.* at 1253. In addition, the court noted that "[p]laintiff's future travel plans are just 'some day' intentions and lack any description of concrete plans or anything more definite than that he will travel to the . . . area in the next year or two probably." *Id.*

Similarly, in *Brother* v. *Tiger Partner, LLC*, 331 F. Supp. 2d 1368 (M.D. Fla. 2004), the district court

held that the plaintiff lacked standing to seek injunctive relief against a hotel under Article III because the record evidence contradicted his assertion that he planned to return to the hotel: the plaintiff lived more than 280 miles away, admitted that he traveled to the area only about twice a year, and lacked "a continuing connection" to the subject property. *Id.* at 1373 (internal quotation marks omitted). The court also discredited his stated intent to return to the property because he was "involved in a multitude of lawsuits against the hotel industry" and "countless other hotels" were located near places he claimed an intent to visit, "including hotels that [the plaintiff] is suing." *Id.* at 1373-74. See also *Brother* v. *CPL Invs., Inc.*, 317 F. Supp. 2d 1358, 1369 (S.D. Fla. 2004) (same plaintiff lacked standing to sue different hotel where court would not credit his stated intent to return because he never stayed at the hotel, cancelled a subsequent reservation, and had been involved in at least 50 other ADA lawsuits in Florida).[11]

Other courts likewise have concluded that a plaintiff's prior history of repeat ADA litigation is relevant to assessing the credibility of the plaintiff's stated intent to return to a particular facility – in accord with the district court decision and panel dissent below but in conflict with the panel majority.

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[11] *See also Deck* v. *American Haw. Cruises, Inc.*, 121 F. Supp. 2d 1292, 1299 (D. Haw. 2000) (no standing under ADA to sue cruise line where the plaintiff stated only that she would "look into" another trip on defendant or another cruise line in the near future) (internal quotation omitted); *Harris* v. *Del Taco, Inc.*, 396 F. Supp. 2d 1107, 1113-16 (C.D. Cal. 2005) (no standing under ADA to sue restaurant despite the plaintiff's affidavit that he would return because the plaintiff lived nearly 600 miles away and had only visited the restaurant once (after pulling off the highway) prior to filing suit.

In *Tiger Partner*, 331 F. Supp. 2d at 1374-75, for example, the court stated:

> [I]n view of his extensive litigation history, Mr. Brother's professed intent to return to the property is insufficient. Indeed, to satisfy Article III's standing requirements, Mr. Brother has professed an intent to return to all fifty-four of the properties he has sued. This is simply implausible.

Similarly, in *Molski* v. *Mandarin Touch Restaurant*, 385 F. Supp. 2d 1042 (C.D. Cal. 2005), the court found that Mr. Molski's expressed intent to return to the defendant's restaurant was "even more questionable" than Mr. Brother's stated intent in *Tiger Partner* because Mr. Molski had previously sued "400 or more businesses spread across the entire state of California" and his "own track record demonstrates that he rarely returns to the businesses that he sues." *Id.* at 1046. See also *Rodriguez* v. *Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1279, 1284-85 (M.D. Fla. 2004) (finding that ADA plaintiff "lack[ed] credibility" and "did not convey any honest desire to return" to hotel because his 200 prior ADA lawsuits and testimony "left the distinct impression that he is merely a professional pawn in an ongoing scheme to bilk attorney's fees from the Defendant").

In sum, different federal courts have taken different approaches to Article III standing principles in the ADA context, which has led to disparate treatment of similarly situated plaintiffs. In particular, the Ninth Circuit's holding that respondent has standing to pursue her claim in federal court is irreconcilable with the holdings of numerous federal courts, including sister Circuits, that plaintiffs in virtually indistinguishable circumstances do not. Article III deserves a uniform interpretation; access

to a federal court should not depend on the fortuity of geography. Only this Court can ensure that Article III is applied consistently.

III. THE COURT OF APPEALS' ADA STANDING RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The court of appeals' dilution of this Court's standing principles in the ADA context also presents a recurring and "important question" of federal law that warrants this Court's attention. See Sup. Ct. R. 10(c).

The court of appeals' decision, if left standing, will have enormous impact on ADA litigation in the Ninth Circuit as well as nationwide, and must be understood in the context of the explosive growth in recent years of aggressive private enforcement of Title III of the ADA, including lawsuits that do little to vindicate the ADA's laudatory purpose of fully integrating the disabled into society. Catalyzed by the emergence of overlapping state law damages remedies in jurisdictions including California, as well as the availability of substantial attorney's fees, ADA plaintiffs and their attorneys now pursue large monetary recoveries, along with injunctive relief, in federal court.

The ability so readily to profit from ADA private enforcement has given rise to what several federal courts have described as a "cottage industry" in such litigation. See, *e.g.*, *Rodriguez*, 305 F. Supp. 2d at 1280-81. In numerous jurisdictions – California, Hawaii, Florida, Illinois, and New York, among others – repeat cases are now routinely filed by a relatively small number of plaintiffs (and their counsel), who assume the role of private attorneys general, *id.*, and for whom "the means for enforcing

the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)," *Tiger Partner*, 331 F. Supp. 2d at 1375. Federal courts have labeled these litigants "professional plaintiffs," "serial plaintiffs," and "professional pawn[s]." See, *e.g.*, *Rodriguez*, 305 F. Supp. 2d at 1285; *Molski* v. *Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863-68 (C.D. Cal. 2004).

Courts have explained that the *modus operandi* of these plaintiffs is to visit as many businesses as possible to identify potential ADA violations. See *Molski*, 347 F. Supp. 2d at 863. Rather than encourage voluntary compliance by notifying the business of potential violations and attempting "conciliation," *Rodriguez*, 305 F. Supp. 2d at 1281, the plaintiffs simply sue – often on a delayed basis to permit statutory penalties rapidly to accrue. The resulting lawsuits often request damages that would force the targeted establishments into bankruptcy, see *Molski*, 347 F. Supp. 2d at 863. The specter of costly litigation compounded by the risk of a potentially fatal adverse judgment induces most businesses targeted by this cottage industry to settle promptly. See, *e.g.*, *Doran* v. *Del Taco, Inc.*, 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005), *vacated on other grounds*, 237 F. App'x 148 (9th Cir. 2007). It is an economically rational response to "'an old Chicago-style shakedown.'" Carol J. Williams, *Disabled Man's Crusade a Bane to Business Owners*, L.A. Times, Jan. 5, 2009, at col. 1, *available at* http://www.latimes.com/news/local/la-me-adasuits5-2009jan05,0,7595452,full.story. Indeed, some businesses have been forced to defend against identical claims of competing plaintiffs over the same facilities. See *Rodriguez*, 305 F. Supp. 2d at 1282 n.13.

From 1992 to 2003, the number of Title III lawsuits filed in California federal courts increased by over 6000 percent. See Cari Becker, *Private Enforcement Of The Americans With Disabilities Act Via Serial Litigation: Abusive Or Commendable?*, 17 Hastings Women's L.J. 93, 107 n.102 (2006); see also Walter Olson, *The ADA Shakedown Racket*, The City J. (Winter 2004), *available at* http://www.city-journal.org/html/14_1_the_ada_shakedown.html). Indeed, California has the dubious honor of being named by the American Tort Reform Association as among the nation's "Judicial Hellholes" due to the proliferation of ADA litigation, especially in the Los Angeles area. Am. Tort Reform Found., *Judicial Hellholes 2008/2009*, at 15-16 (2008), *available at* http://www.atra.org/reports/hellholes/report.pdf. The experience of Florida federal courts has been comparable: a virtual "explosion of private ADA-related litigation" solely "driven by economics – that is, the economics of attorney's fees." *Rodriguez*, 305 F. Supp. 2d at 1281-82.

The value of this serial litigation in vindicating the purposes of the ADA is a subject of legitimate debate. While it may result in some public accommodations becoming more accessible to the disabled, it may do so by forcing already-compliant businesses – *e.g.*, businesses with facilities that pre-date the enactment of the ADA and that satisfy the "readily achievable" standard – to undertake costly retrofitting solely to avoid litigation and by (mis)directing limited remedial resources toward facilities that particular litigants choose as convenient targets for settlements rather than facilities the accessibility of which would more broadly benefit the disabled community.

Whatever the benefits of this litigation, however, it imposes significant burdens on the targeted

businesses and the judicial system. Businesses face potentially bankrupting ADA litigation by plaintiffs who visit their establishments on a single occasion and have no provable prospect of ever returning. To avoid the time, cost and harmful publicity of defending lawsuits, businesses and their insurers agree to coercive settlements rather than pursue valid ADA defenses. In addition, the integrity of the bar is called into question, and the public's confidence in the courts is impaired. See *Doran*, 373 F. Supp. 2d at 1031. Moreover, disabled individuals themselves are harmed, for while access may incrementally improve, the spirit and purpose of the ADA is undermined. *Molski*, 347 F. Supp. 2d at 867. In particular, vexatious litigation tactics create a backlash against the very disabled persons who rely on the ADA to vindicate their rights.

In the context of this litigation explosion, Article III standing principles play a critical role in enabling federal courts to distinguish between cases in which the plaintiff has a real and personal stake in the injunctive relief that they are seeking against the particular business and cases in which the plaintiff does not. Indeed, lack of standing is a commonly asserted defense to Title III suits brought by repeat plaintiffs, whose boilerplate assertions of intent to return to a subject property often do not withstand scrutiny, particularly when coupled with plaintiffs' exceptionally poor track records of returning to facilities they have previously sued.

Here, however, the Ninth Circuit has largely eviscerated this Court's standing principles in the ADA context by holding that a serial ADA plaintiff has standing to seek injunctive relief from a place of public accommodation, notwithstanding well-supported findings by the district judge after an

evidentiary hearing that she failed to prove any intent to return at the time her complaint was filed and has failed to return to other establishments she has sued. The inevitable result will be further proliferation of the vexatious litigation tactics described in this petition, and an increase in all of the social and economic costs that they impose. Accordingly, the Ninth Circuit's standing ruling poses a question of fundamental importance that warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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